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No. 95-1109

In the Supreme Court of the United States

OCTOBER TERM, 1995

HAROLD D. MURDOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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I

QUESTION PRESENTED

Whether Title III of the Organized Crime Control Act of 1968 requires suppression, in a federal criminal prosecution, of the contents of a telephone conversation that a private party intercepted in violation of Title III without the knowledge or participation of the government.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 63 F.3d 1391. The district court's order of August 3, 1993, denying the motion to dismiss the indictment and suppress evidence (Pet. App. 42-43) and its memorandum opinion and order of January 4, 1994, denying the motion for rehearing (Pet. App. 44-55) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1995. A petition for rehearing en banc was denied on October 6, 1995. Pet. App. 56. The petition for a writ of certiorari was filed on January 4, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional plea of guilty, petitioner was convicted in the United States District Court for the Eastern District of Michigan of attempted income tax evasion, in violation of 26 U.S.C. 7201. The district court sentenced petitioner to a term of imprisonment of one year and one day. The court of appeals affirmed. Pet. App. 1-33.

1. In 1985, petitioner and his wife were separated, but they continued jointly to operate a funeral home business. The couple's marital difficulties prompted petitioner's wife to record petitioner's telephone calls on the funeral home's telephone line. She did so by connecting a tape recorder to an extension telephone in her residence, which was located next to the funeral home. Petitioner's wife accumulated two shoe boxes of tapes containing her husband's telephone conversations. A story in the local newspaper led her to believe that one conversation that she had taped contained evidence that her husband, who was President of the Detroit, Michigan, school board, had accepted bribes from a contractor who supplied milk to the school system. Anonymously, she mailed a copy of that taped conversation to the losing bidder, which provided the conversations to the local prosecuting attorney and to a newspaper. The newspaper printed an article outlining the bribery scheme. That story led federal agents to initiate a criminal investigation of petitioner, which culminated in an indictment for income tax evasion, based on the fact that petitioner had not reported a $90,000 bribe as income on his tax return. Pet. App. 2-3.

The district court denied petitioner's motion to dismiss the indictment or to suppress the contents of the taped conversation under 18 U.S.C. 2515 of Title III of the Omnibus Crime Control and Safe Streets Act of 1962.* Pet. App. 42-43. While Section 2515 bars the evidentiary use of communications intercepted in violation of Title III, the court concluded that the taping of conversations over an extension phone does not constitute an illegal interception under 18 U.S.C. 2510(4) and (5). Pet. App. 41-49. As an alternative basis for its decision, the court held that suppression was not an appropriate remedy for the alleged violation under Section 2515, because government agents had not taken part in the interception, and because "[n]o deterrent effect is served by punishing the government for the alleged wrongdoings of [petitioner's wife]." Pet. App. 51.

2. The court of appeals affirmed. Pet. App. 1-33. It held, first, that petitioner's wife had violated Title III by taping petitioner's conversations. *Id.* at 6-22. The use of a recording device attached to an extension telephone to monitor petitioner's telephone calls constituted an "interception," the court stated, and did not fall within the "telephone extension exemption" provided by 18 U.S.C. 2510(4) and (5). Pet. App. 6-22.

The court of appeals held, however, that suppression was not an appropriate remedy for the violation in this case. The court explained that, while 18 U.S.C. 2515 provides for the exclusion from evidence of illegally intercepted communications, that remedy does not apply where the communication is offered into evidence by an entity, such as the government in

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* Title III was amended by the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848.

this case, that did not participate in the interception. Pet. App. 29. Moreover, the court noted, because the government was not involved in the illegal interception, suppression of the intercepted conversation would not deter violations of the statute. *Id.* at 28-29.

The court acknowledged that its holding that Section 2515 is subject to a "clean hands" exception conflicts with the First Circuit's holding in *United States* v. *Vest*, 813 F.2d 477 (1987), that suppression of all illegally intercepted communications is required under Section 2515, without regard to whether the proponent of the evidence was a party to the illegal interception, in order to vindicate the privacy rights of the victim of the interception. Pet. App. 22-32. The court of appeals stated that the First Circuit had erred in *Vest* in interpreting *Gelbard* v. *United States*, 408 U.S. 41, 47-52 (1972), to require the suppression of all illegally intercepted wire or oral communications. Pet. App. 23-24. The court of appeals noted that, because *Gelbard* involved a claim that the government had conducted an illegal wiretap and was attempting to use the fruits of that wiretap in a grand jury investigation, the decision in that case did not mandate suppression of evidence offered by parties who did not participate in the unlawful interception. *Id.* at 24-25.

ARGUMENT

Petitioner claims (Pet. 8-9) that review is warranted to resolve the conflict between the decision below and *United States* v. *Vest*, 813 F.2d 477 (1st Cir. 1987), with regard to the question whether 18 U.S.C. 2515 requires the suppression of an illegally intercepted communication that is offered by a party who did not participate in the interception. The court of

appeals correctly held that suppression is not required under those circumstances. While petitioner is correct that the decision below conflicts with the decision in *Vest*, review is not warranted, because the question presented has arisen so infrequently that its resolution would appear at this time to be of little importance to the administration of justice.

1. Section 2515 provides that:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding * * * if the disclosure of that information would be in violation of this chapter.

18 U.S.C. 2515. Read literally, Section 2515 would preclude the receipt in evidence of illegally obtained wiretap evidence for any purpose, including in a prosecution of a defendant under 18 U.S.C. 2511 for illegally intercepting communications, and in a civil action for damages under 18 U.S.C. 2520 arising from such an illegal interception. To avoid such results, this Court has instead held, based on the legislative history of Section 2515, that the suppression provision "was not intended 'generally to press the scope of the suppression role beyond present search and seizure law'" under the Fourth Amendment. See *Scott* v. *United States*, 436 U.S. 128, 139 (1978) (quoting S. Rep. No. 1097, 90th Cong., 2d Sess. 96 (1968)).

Under Fourth Amendment doctrine, it is well established that the exclusionary rule does not require suppression of evidence that falls into the government's hands following a private search and seizure.

United States v. *Jacobsen*, 466 U.S. 109, 113-118 (1984); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 488 (1971); *Burdeau* v. *McDowell*, 256 U.S. 465 (1921). That is because "[t]he exclusionary rules were fashioned 'to prevent, not to repair,' and their target is official misconduct." *Coolidge*, 403 U.S. at 488. In this case, the government played no part in the illegal interception by petitioner's wife of his telephone calls but instead learned of the substance of that interception after it had occurred. Accordingly, the exclusionary rule's goal of deterring unlawful conduct would not be advanced by barring the government from offering that evidence at trial.

In every case in which the application of Title III's exclusionary provision has been at issue, this Court has inquired whether the statute's legislative history supports that remedy. See *Scott*, 436 U.S. at 139; *United States* v. *Donovan*, 429 U.S. 413, 437-439 (1977); *United States* v. *Chavez*, 416 U.S. 562, 578 (1974); *United States* v. *Giordano*, 416 U.S. 505, 516-521 (1974); *Gelbard* v. *United States*, 408 U.S. 41 (1972). As the court of appeals recognized (Pet. App. 29), the legislative history of Title III supports the view that Section 2515 does not mandate the suppression of intercepted communications when offered by a party with "clean hands." As the Court has noted, the purpose of Title III is to protect privacy by regulating wiretapping and electronic surveillance. *Gelbard*, 408 U.S. at 47. The statute seeks to attain that objective by prohibiting certain types of wiretaps and electronic surveillance, by providing the victim of an unlawful interception a right to pursue money damages against the interceptor and by, in Section 2515, requiring the courts to exclude from evidence ille-

gally intercepted communications or the fruits of such communications.

The legislative history relating to Section 2515 makes clear that that provision was designed to deter violations of Title III. The Senate Report accompanying Title III (S. Rep. No. 1097, 90th Cong., 2d Sess. 96 (1968), explains that the overarching function of Section 2515 is to "compel compliance with the other prohibitions of the chapter." To achieve that goal, the Report states, "*[t]he perpetrator* must be denied the fruits of his unlawful actions in civil and criminal proceedings." S. Rep. No. 1097 at 69 (emphasis added) (quoted at *Gelbard*, 408 U.S. at 50). The Report adds that Section 2515 "largely reflects existing law," and that Congress did not intend "generally to press the scope of the suppression r[u]le beyond present search and seizure law. See *Walder* v. *United States*, 347 U.S. 62 (1954)." S. Rep. No. 1097, *supra*, at 96.

Depriving the government of the opportunity to offer the probative evidence of petitioner's guilt contained on the tape-recordings at issue in this case would not further Section 2515's deterrent purpose, because the government did nothing to bring about the illegal tape-recording. The "perpetrator" of the illegal recording was, instead, petitioner's wife, who recorded the calls on the business extension as a result of her suspicions of petitioner's marital infidelities. The government was not complicit in undertaking the interception; on the contrary, the government did not learn of the bribery scheme that was reflected on the tape-recordings from petitioner's wife, but from a newspaper article. Suppression in this case would therefore be contrary to this Court's teaching that Title III's suppression sanction should be limited to violations of those statutory require-

ments that "directly and substantially implement the congressional intent[]" in enacting the legislation. See *Donovan*, 429 U.S. at 433-434 (suppression not required where government failed to comply with identification requirements of 18 U.S.C. 2518(1)(b)(iv) and notice requirement of 18 U.S.C. 2518(8)(d)); *Chavez*, 416 U.S. at 577-578 (suppression not required when government misidentified authorizing official); *Giordano*, 416 U.S. at 527.

2. In *Vest*, the First Circuit reached the opposite result, holding that Congress's concern for the privacy interests of the victim of an illegal wiretap, which this Court noted in *Gelbard*, required the suppression of illegally intercepted communications whether or not the party offering such evidence had illegally procured it. 813 F.2d at 481. The First Circuit explained that "[t]he impact of this second invasion [of privacy] is not lessened by the circumstance that the disclosing party (here, the government) is merely the innocent recipient of a communication illegally intercepted by the guilty interceptor." *Ibid.*

In our view, the First Circuit erred in interpreting this Court's decision in *Gelbard* as making the privacy interests of the victim the sole determinant of the scope of the Section 2515 suppression remedy. At issue in *Gelbard* was a claim by a grand jury witness that the government had engaged in illegal wiretapping and electronic surveillance and that such surveillance would form the basis of his anticipated questioning before the grand jury. *Gelbard* held that if such evidence had been unlawfully intercepted by the government, it should be suppressed. In so holding, the Court noted, in part, that Section 2515 serves "as an evidentiary sanction to compel com-

pliance with the other provisions of" Title III, 408 U.S. at 50 n.9, quoting S. Rep. No. 1097, *supra*, at 96; and that suppression avoided entangling "the courts in the illegal acts of government agents." 408 U.S. at 51. The Court did not indicate that suppression would invariably be required where a violation of Title III had occurred, or where suppression would not serve the interest of deterring misconduct.

As the court of appeals in this case noted (Pet. App. 25) in explaining its disagreement with *Vest*,

> [t]he point of *Gelbard* was that *if* the government was eventually shown to have illegally intercepted the conversations, then the witness was entitled under Title III to have that evidence suppressed and completely excluded from any line of questioning in any proceeding, including a grand jury proceeding. To cite *Gelbard* as standing for the proposition that the entire purpose of Title III is to prevent victimization in the form of invasion of privacy goes too far.

Moreover, *Vest* is itself internally inconsistent. Despite its assertion that the victim's privacy interest dictates that the illegally intercepted communications be suppressed, the First Circuit held in *Vest* that such evidence could nonetheless be introduced under Section 2515 for the purpose of impeaching the victim's testimony. 813 F.2d at 484; see also *Forsyth* v. *Barr*, 19 F.3d 1527, 1541 (5th Cir.) (illegally intercepted information may be used for the purpose of impeachment), cert. denied, 115 S. Ct. 195 (1994); *United States* v. *Echavarria-Olarte*, 904 F.2d 1391, 1397 (9th Cir. 1990) (same). The First Circuit based that holding on the fact that the Senate Report cites *Walder* v. *United States*, 347 U.S. 62 (1954), see S.

Rep. No. 1097, *supra*, at 96, which held that under the Fourth Amendment, illegally obtained evidence may be offered to impeach a defendant's contrary testimony. In the sentence that immediately precedes the citation to *Walder*, however, the Senate Report states that Section 2515 was not intended "generally to press the scope of the suppression r[u]le beyond present search and seizure law." S. Rep. No. 1097, *supra*, at 96. The Senate Report's citation to *Walder* thus appears to have been illustrative, and not exclusive of the search and seizure principles that Title III intended to retain. Cf. *Scott*, 436 U.S. at 139. There is no reason why the settled Fourth Amendment principle that suppression is not required where evidence that had been illegally obtained by a private party falls into the government's hands should not also be applied in the Title III context.

In any event, while the decision below conflicts with the First Circuit's decision in *Vest* on the question whether Section 2515 requires the exclusion of illegally intercepted evidence when offered by an entity who was not party to the interception, we do not believe review of that question is warranted. That question arises very infrequently. We are not aware of any reported case that has addressed the question between 1987, when *Vest* was decided, and the date of the decision in the present case. There is therefore no need for that issue to be addressed at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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